## Subsidiarity as a method of policy centralisation

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# *Subsidiarity as a Method of Policy Centralisation*

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## I. INTRODUCTION

SUBSIDIARITY, AT LEAST as defined within the European Union, provides that the centre will only act where the goals of the proposed action cannot, or cannot adequately, be met by decentralised action.[1] It therefore assumes an agreed goal, unsurprising given its Catholic roots, and is a principle concerning who should take measures to achieve this. This exposes two limits to the value of subsidiarity in the EU or other international organisations:

1. Many conflicts between levels do not concern who is best placed to pursue an agreed goal, but are conflicts over the relationship between the goals of the lower and higher levels; which should prevail, or to what extent. To this situation, subsidiarity has no relevance.
2. As a rhetorical device subsidiarity is intellectually centralising. It places the central policy goal beyond dispute, while denying any voice to the potentially diverging policy goals of the states. It translates the complex relationship between levels into the single question of who can best implement the policies of the centre.

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[1] Art 5 EC: 'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.' See, for an expanded version of this definition, providing clues on what 'sufficiently achieved' and 'by reason of the scale or effects' may mean, the Protocol (No 30) to the Treaty of Amsterdam, on the Application of the Principles of Subsidiarity and Proportionality, [1997] OJ 1997 C340/105.

Indeed, its talk of the 'goals of the proposed action' indicates a certain linguistic sneakiness. Actions have all the purposes possessed by those supporting them, which may be multiple, contradictory and even paradoxical. Speaking of the goal as if this was a simple and uncontested attribute suggests either that all participants have a level of unity and agreement which does not exist in the real world, or is a rhetorical trick to avoid thinking about real people and purposes at all, and elevate the action to a status of self-evident singularity of purpose which can only stifle discussion.

These intellectual deficits are translated into concrete problems as a result of the relatively imprecise delimitation of Community competences,[2] and the Community law principle of supremacy. The first of these means that there are many areas where Community and national policies meet and potentially conflict, and that is it not possible to say with any satisfying degree of precision what the limits to Community activities are.[3] In the internal market, in particular, the Community's powers to harmonise all national law obstructing movement or affecting competition touch on many areas of activity.[4] Supremacy then makes these problems more immediate by requiring that where national and Community rules do conflict, all national judges and authorities immediately disapply the national rule in favour of the Community one.[5] This directly effective and widely enforced principle means that states can hardly avoid or delay conflicts, or indulge in the luxury of limited or late compliance with directly effective Community law.[6] If states attempt to sideline Community law in favour of other policies, then in general their own judges will call them to order.[7]

By embracing subsidiarity as a central idea in choice-of-level decisions states therefore emasculate themselves. They back the wrong horse,

[2] See A Von Bogdandy and J Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 *Common Market Law Review* 227.

[3] A Dashwood, 'The Limits of European Community Powers' (1996) 21 *European Law Review* 113; R Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30 *Common Market Law Review* 85.

[4] See Articles 94 and 95 EC; Barents, above n 3; J Usher, 'Annotation of Case C-376/98' (2001) 38 *Common Market Law Review* 1519.

[5] See Case 6/64 *Costa v Enel* [1964] ECR 585; Case 106/77 *Simmenthal* [1978] ECR 629; PP Craig and G De Burca, *EU Law* (4th edn, Oxford University Press, 2007) 344–78.

[6] Direct effect is the Community law rule providing that measures to which it applies (generally those that are sufficiently clear to be justiciable, probably the majority of legislation and Treaty texts) must be applied not only by Community courts and institutions but all national courts and authorities too. See Craig and De Burca, above n 5, 268–304.

[7] Litigants are able to pursue delinquent states and authorities in national courts, and Community law provides procedural as well as substantive safeguards for these trials. See, eg, J Komarek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42 *Common Market Law Review* 9; M Accetto and S Zleptnig, 'The Principle of Effectiveness: Rethinking its Role in Community Law' (2005) 11 *European Public Law* 375.

focusing on a principle that does not in fact protect their powers, with direct and visible domestic legal consequences. This chapter suggests that instead of concentrating on subsidiarity, which simply defends their right to act as the delegates of the higher level and its stated objectives, states should be calling for Community law to explicitly apply a balancing process between the autonomous and conflicting goals of different levels.[8] The target of Member State ire should be the dominance of subsidiarity, and its implicit presumption that all lower policies, however important, must always give way before all higher policies, however marginal.

The interpretative mistake that the states make, and which is often made in popular discourse, is reading subsidiarity as no more than a cipher for 'which level should do what'. It is suggested here that it is a more precise and technocratic concept than this. Ignoring its internal structure in favour of broad policy arguments results in miscommunication with the Commission,[9] failed lawsuits and an inability to deal with competence disputes in a legal way. By mislabelling conflicts between national and Community objectives as subsidiarity issues, states are in fact saying, although it is not what they mean to say, 'the problem here is deciding who can achieve Community goals best'. The Commission and European and national judges therefore look at this issue alone, ignoring the national goals. The very matter that states wished to draw attention to, the conflicting of objectives, is therefore missed in the judgments and decisions, no doubt to the great frustration of national authorities.[10] This chapter argues that if they used legal principles more carefully they could avoid this misunderstanding.

## II. CONFLICTS BETWEEN LEVELS

There are two kinds of fundamental problems that international organisations face. One is how to achieve their goals most effectively and efficiently. There is a tendency for institutions and bureaucracies to give up control reluctantly, to delegate too little and to over-centralise. Yet often, much of the work of achieving practical ends is best done by those familiar with local circumstances—state or sub-state governments.

The other problem is how to balance the goals of the organisation against the interests and goals of the states with which they may conflict.

[8] On this balancing see J Snell, 'True Proportionality' (2000) 11 *European Business Law Review* 50.

[9] Particularly in the context of consultations on subsidiarity: see below n 51.

[10] This is precisely what occurred in: Case C–154/04 *Alliance for Natural Health* (Judgment) 12 July 2005; Case C–491/01 *British American Tobacco* [2002] ECR I–11453; Case C–84/94 *UK v Council (Working Time Directive)* [1996] ECR I–5755; Case C–377/98 *Netherlands v Parliament and Council (Biotechnology Directive)* [2001] ECR I–7079.

In principle, one would think that states would not delegate powers to an organisation that might conflict with their own interests. In practice, the compromises necessary to reach international agreements mean that international (and European) law are riddled with over-absolute, over-simple, over-broad statements of law, which have the potential to conflict with many other policies.

It is this latter kind of problem that has caused the greatest stress within international organisations in recent years. In particular, the relatively stark principles of free trade found in the World Trade Organization (WTO) and the EU can conflict with national policies concerning environment, culture, consumer protection, morality and social solidarity.[11] One solution is to encourage international dispute resolution bodies to balance these interests in their decision-making, but this entails a transfer of power over such sensitive matters to the centre, which is controversial for at least two reasons. On the one hand, there is resistance to centralisation in itself, while on the other, this form of centralisation will stimulate, and perhaps result from, increased judicial activism, which is viewed with particular suspicion when it takes place in an international forum. For both reasons, many are unhappy with the WTO Appellate Body or European Court of Justice having the final word on state standards of morality or environmental protection.[12] The alternative is to soften the requirements of the trade law, which is of course resisted on many other grounds.

Both of these kinds of problems are conflict-of-level problems, where the essential question is which level gets to decide on some disputed point, or which level gets to exercise the power in a certain area. Subsidiarity is therefore often thought to be of help. It appears to call for the greatest decentralisation possible, and so should provide a framework for ensuring that sensitive and nationally variable matters are not taken over by centralised bureaucracies or courts.[13] The argument of this chapter is that subsidiarity is no use here. It helps with the first kind of problem, the efficiency type, but does not address the issue which presents the more serious threat, that of the conflict of interests. Moreover, the argumentative structure of subsidiarity actively suppresses and denies these conflicts, making intelligent consideration of how to deal with them

[11] The literature is vast. An introduction to the issues can be found in, eg, B De Witte, 'Non-market Values in Internal Market Legislation' in NN Shuibhne (ed), *Regulating the Internal Market* (Cheltenham, Edward Elgar, 2006) 61; J Scott, 'International Trade and Environmental Governance' (2004) 15 *European Journal of International Law* 307; JP Trachtman, 'Trade and . . . Problems, Cost–Benefit Analysis and Subsidiarity' (1998) 9 *European Journal of International Law* 32.

[12] See Trachtman, above n 11.

[13] See LC Backer, 'Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems' (DATE??) 4 *Tulsa Journal of Comparative and International Law* 185.

harder to attain. The argument is made with reference to the EU, where subsidiarity has a history, and cases and concrete examples are used. However, it is relevant to any multi-level organisation which thinks that it may preserve the autonomy of its lower levels by building subsidiarity into its rules.

## III. SUBSIDIARITY IN THE EU

Subsidiarity in the EU requires that the Community only act where 'the objectives of the proposed action cannot be achieved sufficiently by the Member States'.[14] The point of the principle, clearly, and conventionally, is to ensure that functions are delegated to the lowest level capable of performing them effectively.[15]

Subsidiarity has therefore been embraced as an intellectual and legal framework for protecting the competences of the Member States from unnecessary annexation by Brussels.[16] Whatever the Member States can adequately do themselves, they should. Of course, subsidiarity offers no protection for states who wish to do things that they cannot adequately do, but the desire to exercise competences beyond their capacity is something that politicians tend to keep to themselves. In public at least, subsidiarity is accepted as an appropriate guide to deciding who gets to do what.

That is far from saying that it is unproblematic, or widely praised; the criticisms of its vagueness are ubiquitous,[17] and it is possible to debate what level of achievement is 'sufficient'.[18] Supposing Member States could perform a function, but just not quite as well as the EU—that 'by reason of the scale or effects of the proposed action' there were advan-

[14] See above n 1.

[15] See generally: GA Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) *Columbia Law Review* 331; R Van den Bergh, 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy' (1996) 16 *International Review of Law and Economics* 363; N Bernard, 'The Future of European Economic Law in the Light of the Principle of Subsidiarity' (1996) 33 *Common Market Law Review* 633; NW Barber, 'Subsidiarity in the Draft Constitution' (2002) 11 *European Public Law* 197.

[16] See DZ Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community' (1992) 29 *Common Market Law Review* 1107.

[17] See AG Toth, 'Is Subsidiarity Justiciable?' (1994) 19 *European Law Review* 268; K van Kersbergen and B Verbeek, 'The Politics of International Norms: Subsidiarity and the Imperfect Competence Regime of the European Union' (2007) 13 *European Journal of International Relations* 217; D Wyatt, 'Subsidiarity: Is it Too Vague to be Effective as a Legal Principle?' in K Nicolaidis and S Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union*, Oxford University European Studies, available at http://www.europeanstudies.ox.ac.uk/WhoseEurope.pdf, 86.

[18] See below n 51, for documents outlining the Commission's approach to this question.

tages to centralisation.[19] Who would get to do it then? That would depend on the meaning of 'sufficiently', about which there are some comments in the relevant protocol, but nothing very concrete.[20] So subsidiarity does not answer the question—but at least it provides an agreed framework, if a loose one, for finding the answer.

But is it the right question? Member States are often upset about the Community invading their turf, but how often is their claim that they could have achieved the goal sufficiently themselves? Actually they quite often do make this claim, but usually because they have misunderstood the law. In most situations their argument should be that the Community action just is not worth doing because the costs for the states—various kinds of costs—are so high.[21] A highly quantifiable example is the impact of free movement of services on healthcare. By requiring patients and healthcare providers to be able to cross borders, healthcare costs are likely to rise. Given that states do not have unlimited funds, some balancing of interests may be necessary. More abstractly, one may consider the effect of a measure harmonising education or language use, as discussed below in this chapter. While having great value to the internal market, its costs in national culture might be astronomical. Again, sensible policy requires a balance to be made. In both cases, this balancing process is an application of proportionality, not subsidiarity.[22]

## IV. SUBSIDIARITY AND SHARED COMPETENCES

Looking at the various kinds of competences that the Community has—and any other international or higher-level governance body might have—makes these abstract statements a bit clearer, and more convincing. Those competences can be categorised or described in many ways, but a conventional division is between the exclusive and the shared.[23] The first are things that only the Community can do, like determining the amount of tax to be collected on imports from outside the Community. Clearly this should not vary from state to state, since the borders between states are open. It would be the equivalent of having different customs duties at different harbours within a state, which would quickly put some out of business. Therefore, Member States can no longer make any decisions about levels of duties, or at least they can only make

[19] EC, Art 5.

[20] Protocol on the Application of the Principles of Subsidiarity and Proportionality, above n 1.

[21] Bermann, above n 15, 339–44.

[22] G De Burca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105; J Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of Economic Integration* 239; Snell, above n 8.

[23] See D Chalmers et al, *European Union Law* (Cambridge University Press, 2006) 188–93.

their decisions collectively via the Community law-making processes.[24] Then there are shared competences, which are found where both the Community and Member States have the power to act in a field. An example of this might be regulating product composition, the way sausages and chairs are made, and so on. In the absence of Community rules it is for the Member States to decide about things like this. On the other hand, if every state has different rules, this could make it difficult to import and export between them, which would hinder the free movement of goods. For this reason, the Community has the power to harmonise such product rules, which it exercises from time to time, when it thinks that the problems arising are serious enough.[25]

Now, as is well known, subsidiarity does not apply to exclusive competences.[26] It makes no sense to ask whether the Community should be leaving things to the Member States if the Treaty says that these states no longer have the power to act. Subsidiarity is only relevant where action could come from either side, the shared situation. So, let us imagine that sausage exporters are complaining bitterly about the costs and problems of doing business with 27 different national sets of rules (I expect sausages were harmonised long ago, but it could be some other product, or indeed service), and the Community thinks it would be a good idea to harmonise. On the other hand, several Member States—but not enough to be a blocking majority, otherwise the point might be moot—really do not want this to happen. They do not want interference with national rules that are established and which the states claim reflect local traditions and preferences.[27] Isn't this what subsidiarity is all about? Who should be making the rules on sausages?

Before answering that, one more example: there are many directives dealing with recognition of qualifications, helping Europeans to move from state to state and overcome the national tendencies to regard all foreign degrees as suspect, inadequate, or both.[28] These directives rely on

[24] *Ibid*.

[25] EC, Art 95. For further discussion see G Davies, 'Can Selling Arrangements be Harmonized?' (2005) 30 *European Law Review* 370.

[26] EC, Art 5.

[27] I am grateful to the reviewer of this chapter for pointing out that such rules could also reflect local sausage producers' interests and government capture. This observation captures the tension in harmonisation perfectly. The Community will take the view that it is helping the local consumer by freeing him from such capture and opening up national markets. But it may be that in fact the rules are genuine reflections of local preferences. Indeed, it may not be an either/or choice: capture may have helped form those preferences. Put another way, there may be consumer capture by the sausage manufacturers too! Which view of the value and nature of the rules is correct is controversial, variable and unlikely to be 'objectively' determinable. The temptation is to think that subsidiarity leads to deference to the states' interpretation. They can decide on their own what local preferences are and how to protect them. The text above argues that where Community free movement rules are involved, subsidiarity has no such conclusion.

[28] A great deal of information is available on the Commission's web pages at http://ec.europa.eu/education/policies/rec_qual/rec_qual_en.html.

the competence that the Community has to harmonise to remove obstacles to the free movement of persons.[29] They might have gone further. Moving between educational systems or transferring qualifications continues to be a tricky matter, and there would have been a good argument for harmonising the length, and at least to some extent the content, of the different phases of education. In fact, something like this is happening informally, as regards universities, via the so-called Bologna process.[30] In any case, it would not be difficult to make the case that such measures would be effective and useful contributions to the goal of free movement, and so prima facie within Community competence. But of course, the Member States would never agree to such far-reaching measures, which is why the more limited ones on mutual recognition are what we in fact have.[31] Yet supposing a proposal had been made for broader harmonisation; would this not be another subsidiarity case study, all about making sure that competences do not get taken away from the states?

Yet subsidiarity would have nothing to do with these situations.[32] In both cases the Community wants to act in order to facilitate free movement. By contrast, the Member States want their own rules on sausages and education because they care about these things, and have strong feelings about what they should consist of. The objective of Community rules would be free movement, but the objective of the national ones is the preservation of national standards, values, culture, history and autonomy. In other words, there is a conflict of objectives or interests.[33] However, asking which interests should take precedence, or how they should be balanced against each other, is quite different from asking, as subsidiarity does, whether the objective of the Community action can be sufficiently achieved by the states.[34]

[29] The legal basis for EC and EU legislation is found in the preamble. For references to legislation, see *ibid*.

[30] This is a process of gradual voluntary harmonisation of aspects of higher education. The Council of Europe has an excellent guide, 'Bologna for Pedestrians' in its higher education section (www.coe.int) (choose education, then higher education, then Bologna process). The current official Bologna Process website is also useful: http://www.ond.vlaanderen.be/hogeronderwijs/bologna.

[31] There is much literature on mutual recognition as a response to the desire to limit competence transfer. See eg SK Schmidt, 'Mutual Recognition as a New Mode of Governance' (2007) 14 *Journal of European Public Policy* 667; K Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition (2007) 14 *Journal of European Public Policy* 682; G Davies, 'Is Mutual Recognition an Alternative to Harmonization?' in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 265.

[32] AG Toth, 'The Principle of Subsidiarity in the Maastricht Treaty' (1992) 29 *Common Market Law Review* 1079.

[33] Bermann, above n 15, 339–44.

[34] It is of course true that in signing the Treaty states implicitly adopted free movement as a goal of their own. However, states have multiple and overlapping goals, so the balancing issue does not go away. It is also true that state measure may ostensibly serve legitimate goals

It might be possible for the states to try and bring their objections within this. They could say that by having some flexibility in their national rules, and allowing foreign products to deviate from national standards, they can achieve 'sufficient' free movement, while still preserving a degree of diversity. Then we would come back to the argument about what 'sufficient' means. Here it is worth listing the criteria that the protocol on subsidiarity provides for deciding whether Community action should be taken or Member State action is sufficient:

- whether the issue has transnational aspects that cannot be sufficiently regulated by action of the Member States;
- whether action by Member States alone or a lack of action by the Community would conflict with the requirements of the Treaty or would otherwise significantly damage Member State interests;
- whether actions at Community level would produce clear benefits by reason of scale or effects.

It is clear from these that the focus is on achieving the goals of the Community—in this case free movement—and the methodology is this: first decide how much free movement the Community needs, and then decide whether the Member States can achieve this alone. That means that the reasons that the Member States might have for not wanting harmonisation—autonomy and culture and so on—are not relevant to determining what is sufficient. They have no place in subsidiarity.

One might think that this is just an oddity of the way the EU uses subsidiarity. 'Sufficiently' could be used in a broad way that allowed all kinds of factors to be taken into account. However, this would change the nature of subsidiarity, and go against the rest of its wording.[35] The essence of subsidiarity is to ask who can reach a given goal best, whether the higher level needs to intervene. It assumes that agreed goal. Consider the classic religious formulation:

but in fact be disguised protectionism. However, this is a matter for judicial review, at least within the EU, and does not remove the balancing need when the goals *are* legitimate. In an international trading system judicial determination of the true character of a measure may be more controversial, leading to other problems. It is the particular and accepted legalisation of the EU system which makes legal principles such as subsidiarity so important.

[35] Subsidiarity in the EU is used in a way broadly consistent with that in other jurisdictions and contexts, ie Germany and Catholic dogma. See I Pernice, 'The Framework Revisited: Constitutional, Federal and Subsidiarity Issues' (1996) 2 *Columbia Journal of European Law* 403; G Taylor, 'Germany: The Subsidiarity Principle' (2006) 4 *International Journal of Constitutional Law* 115; NW Barber, 'The Limited Modesty of Subsidiarity' (2005) 11 *European Law Journal* 308; Cass, above n 16; T Schilling, 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle' (1994) 4 *Yearbook of European Law* 203.

[36] Pope Pius XI, *Quadragisimo Anno*, para 79 (1931).

> So also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organisations can do.[36]

The principle does not address, is not intended to address, the situation where the different levels are actually trying to do different things. Without a common goal, it is 'nonsense'.[37]

## V. SUBSIDIARITY AND PURPOSIVE COMPETENCES

Even if subsidiarity does not encompass the situations above, perhaps it can nevertheless be seen as a useful tool, preventing competence creep in other, still significant ways. A closer examination suggests not. Here it is helpful to consider another way in which competences can be described, dividing them into purposive and categorical powers. A purposive power is one whose scope is defined by its goal—such as the power to harmonise in order to achieve free movement, or perhaps to achieve security and prevent crime—while a categorical power (I may be inventing the phrase here, but it is useful) is one that is defined by a given activity or function—such as the power to determine which level of customs duties will be levied on imported goods, or the power to determine what level of pollutants cars may be permitted to emit.

If an inter-state, or higher-level, body is attributed categorical powers, then subsidiarity will not have much use at all. Such powers are likely to be exclusive, for the reason that it hardly makes sense to attribute a specific role to another body while retaining power to fulfil that role oneself. If the Community is the body deciding acceptable levels of contaminants in drinking water, then it follows as a matter of coherent policy that Member States are no longer doing the same thing.

On the other hand, where purposive powers are attributed, then this is often likely to be because the particular goals entrusted to the higher level are ones that lower bodies acting alone cannot achieve. Hence the Community is given the objectives of ensuring that inter-state trade and movement work well because this goal requires co-ordination and harmonisation of different national laws which manifestly individual states cannot achieve. Hence subsidiarity has no relevance to such purposive powers.[38] Note that this is precisely the sausages and education

[37] 'In relation to levels with no common purpose, talk of subsidiarity is nonsense', G Heraud, *Les principes de Fédéralisme et la Fédération Européene* (Paris, Presses d'Europe, 1965) quoted in V Constaninesco, 'Who's Afraid of Subsidiarity' (1991) 11 *Yearbook of European Law* 33.

[38] Toth, above n 32.

example; the Community there was pursuing goals that were beyond the capacity of the Member States alone to achieve.

So if subsidiarity has any relevance to higher bodies it will be where they are attributed the power to achieve an objective that lower bodies also continue to pursue, where there is a shared goal in which contributions from both sides are necessary. Examples of this might be combating international crime or preventing epidemics or dealing with migration of persons. Here there is clearly a role for a co-ordinating and legislating central body, because of the international element, but much of the actual work done will be local and does not need to be done in the same way everywhere.[39]

In this context subsidiarity compensates for clumsy attribution. One might hope that the powers of the higher body would be defined in a sufficiently precise way that in fact there was little or no overlap with the lower ones—as categorically as possible, one might say. Those writing the treaties would consider which actions need to be taken at the centre—which would usually be the co-ordinating and harmonising ones that Member States cannot do, and to which subsidiarity has no relevance—and only attribute powers to these. Still, there may be ambiguity or simply bad drafting, and there may even be times when it is necessary to have potential power on both levels, perhaps for reasons of flexibility. Then—and only then—does subsidiarity actually have a potential role to play.[40]

However, that potential probably will not be realised. If there is a genuinely shared goal, then disagreements about which level can achieve it best are likely to be relatively technocratic.[41] That is not to say that the issue will not be hugely political, but the political aspects are likely to result from the interaction with other objectives, which subsidiarity will not consider. For example, if the Community decides that it is necessary to ensure that Member States provide each other with evidence concerning international crimes, then the question whether this is best achieved via a central clearing house and standard formats and definitions of evidence, or via a network of bilateral agreements with minimum standards, is essentially technical. Member States may have strong

[39] Backer, above n 13.

[40] Notably in the allocation of roles in the enforcement of rules. See B Rodger and S Wylie, 'Taking the Community Interest Line: Decentralisation and Subsidiarity in Competition Law Enforcement' (1997) 18 *European Competition Law Review* 485; K Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism' (1994) *Fordham International Law Journal* 846; N Farnsworth, 'Subsidiarity—A Conventional Industry Defence. Is the Directive on Environmental Liability with Regard to Prevention and Remedying of Environmental Damage Justified under the Subsidiarity Principle?' (2004) 13 *European Environmental Law Review* 176.

[41] Farnsworth, above n 40, for examples.

feelings concerning other, non-technical aspects, of the measures, such as the implications for rights and freedoms, but here they will be bringing in other interests not strictly relevant to the question of whether bilateral agreements sufficiently ensure the effective exchange of evidence.

Thus such measures will involve two sorts of disagreement: technical disagreements about which measures are most effective, to which subsidiarity is theoretically relevant but as a general principle is likely to be sidelined in favour of the concrete specifics of the issue; and policy disagreements about whether such action is a good thing in the broader context, to which subsidiarity has nothing to add.

In order to make subsidiarity really important in these shared-purpose contexts the objectives of the Community would have to be defined broadly. If, for example, the Community was given the power to take measures 'to create an area of freedom, security and justice', then this would entail not just combating crime but also protecting rights, and the question would then become whether individual Member States or the Community could create the best balance, a subsidiarity argument with real substance. However, attributing such a power to the Community would also entail that it had prima facie competence to more or less take over all aspects of criminal and constitutional law. Thus in order to make subsidiarity exciting, one has to create a higher body with hugely open or broad powers, which is neither in the interests of the lower body—unless it has political ambitions to transfer its powers—or likely to be effective or efficient. One could say here that subsidiarity is a compensation for over-attribution, but one could also say that it provides an inducement to it: the more that is shared, the more can be controlled by subsidiarity. Thus seeking to make subsidiarity central to competence control entails imagining Community powers as broadly as possible. Subsidiarity implicitly encourages centralisation.

## VI. SUBSIDIARITY AND INSTITUTIONAL DYNAMICS

Perhaps more important than any of the above is the simple question of whether higher bodies are really likely to run out of control in these shared-purpose contexts.[42] Is this really the problem? From the point of view of their attributed objectives, there is no motivation to do so. Acting where their purposes could be achieved by the Member States is simply a waste of resources.

If there is a motivation to act even where it is unnecessary it is

[42] A question ultimately requiring empirical research. The text here can do no more than provide a framework for thinking about the issue.

therefore not from the attributed goals but out of institutional motives—the desire to grow and expand the higher apparatus and its powers. The self-maximising urge is certainly common in institutions and we may expect it to exist in the Community. Here subsidiarity provides a policy and efficiency argument against a natural but unhealthy institutional dynamic. It argues against the higher level on its own terms; it says don't do this, because someone else could do it better. Save your resources.

But it is open to question how often higher bodies, and the Community in particular, actually get the opportunity to engage in ineffective measures that are not necessary for their stated goals but are simply self-aggrandising. Community measures do, after all, require the assent of the Member States in the Council.[43] That may only be by majority,[44] but is it likely that there would be a majority of states interested in unnecessarily transferring powers to the Community?

This could happen if states wished to centralise for other reasons. One possibility would be political ambition for Europe, the desire to build a bigger, more 'prestigious' EU. However, while often mentioned in various countries—at least until recently—it is suggested, tentatively since this is really a matter for the political scientists, that when it comes to concrete measures Member States are usually reluctant to give up their own powers for such a woolly reason. This is particularly so since shared-purpose contexts tend to be politically sensitive. They are, of their essence, matters that are too important for states to let go, and yet where their capacity to act autonomously is threatened by externalities, requiring them to co-operate. In such contexts states are usually reluctant to give up power, and will not rush to do so.

The other reason why they might vote for apparently unnecessary measures is where there is genuine disagreement about the technocratic question of which level is most effective. But then they are, in their own eyes, not voting against subsidiarity at all. Thus this is not a situation where subsidiarity will add anything to the analysis. While the minority may cry that it has been violated, others will genuinely feel that it has not, and the Court, assuming that it is a matter where expert arguments for both views exist, will be unlikely to second-guess the majority.

By contrast, where one does get real fierce disagreement between Member States is when it comes to the balancing of interests and goals. Should privacy be sacrificed to fight crime? Is trade more important than the quality of sausages? Such value questions are the traditional stuff of politics, that is to say they are unanswerable definitively, and there will be great differences of view. In particular, the Community is likely to

[43] See Craig and De Burca, above n 5, 108–25.
[44] *Ibid*.

value its goals more highly than those of the states, and vice versa, but it may, to some extent, be able to influence some states towards its point of view. In the situations where Member States feel that the Community has taken its competences too far, the legislation in question invariably embodies a value-balance that the majority are comfortable with, but which the minority abhor. Then there is a really important question to be answered: should the majority be able to impose their value choices like this? Clearly they must be able to sometimes, because a choice has been made to allow the Community to legislate in the given area. However, there is no need to interpret that to mean that measures which, from the point of view of the Community, are not particularly important should be allowed when the value-violence that they do to some states, or the autonomy cost they impose, is considerable. In other words, there is a proportionality argument to be had. Subsidiarity, however, will not be involved.

Even where subsidiarity does apply to a measure, and actually bites, it is not clear that this has a meaningful autonomy-preserving effect. If a measure fails the subsidiarity test, then this is because its goals could have been achieved sufficiently by the Member States. Implicitly, that is then to occur{{SENSE??}}. Thus, under subsidiarity, the alternative to Community action is Community-instructed Member State action to achieve the same end.

In practice this means that either the Community can issue very detailed legislation, or perhaps create a new Community organ or agency, or it can issue general instructions to Member States to achieve certain goals themselves.[45] This effectively makes them Community agents, and when they are achieving these goals—by legislating or creating agencies or spending or whatever—they will be acting within the sphere of the Community instructions and constrained by these and all the other principles of Community law. Subsidiarity thus offers the choice between centralisation or co-option.[46]

This choice may have efficiency implications which could lead in either direction. Sometimes it is better to act centrally, and sometimes not. However, its implications for national autonomy are equally open. There are times when requiring national ministries to devote themselves to preparing laws and measures to implement Community goals will entail

[45] The so-called 'new approach' to harmonisation. See Chalmers, above n 23, 474–505. See on agencies Case C–217/04 *UK v Parliament and Council* [2006] ECR I–3771; Case C–436/03 *ECS* [2006] ECR I–3733; both annotated by V Randazzo at (2007) 44 *Common Market Law Review* 155.

[46] See N Emiliou, 'Subsidiarity: An Effective Barrier against the Enterprises of Ambition?' (1992) 17 *European Law Review* 383; Schilling, above n 35; Barber, above n 15; MP Maduro, 'So Close and Yet So Far: the Paradoxes of Mutual Recognition' (2007) 14 *Journal of European Public Policy* 814; Davies, above n 31.

a greater loss of national policy freedom than creating a Community agency to do the same, or passing very detailed Community legislation which can be mindlessly adopted into national law. The issues here are institutional. When national authorities are working full time in the service of Community goals they have less time and resources left over for other national matters. Moreover, they way they think and work becomes structured by Community ways of doing things, with knock-on effects for other matters.[47] There is a good argument that the move from regulations to directives, which was embraced as subsidiarity at work, and a way of giving Member States more autonomy within the sphere of Community law, has backfired.[48] The coherence of national legal systems is superficially protected by allowing Community law to be translated into national legislation, but the political autonomy of Member States is threatened. Many governmental departments have become little more than outsourced units of the EU, devoting themselves full time to questions of implementation—of how to achieve the Community's goals—when once they had energy to develop national policy too. Co-option is here more centralising than centralisation, which at least leaves the periphery intellectual freedom.[49]

What subsidiarity does not at all offer is a leave-well-alone option, a reason for the Community to simply back off from an issue and let the states occupy that field as they wish. That could only happen if the goal of the Community measure was rejected as well, thus preventing the obligation to reach that goal from being transferred unto the states. Implicitly such a rejection is outside of subsidiarity itself. Subsidiarity assumes the validity of the goal and asks who should meet it. In the Community context the goal in question is usually lifted directly from the Treaty, and so its validity is hardly an issue. It only becomes one where the real goal of the measure is clearly something other than the goal attributed to it. However, in that case the measure is annulled for lack of legal base, or an incorrect legal base, and the subsidiarity question is never reached.[50]

[47] See S Weatherill, 'Harmonisation. How Much, How Little?' (2005) 16 *European Business Law Review* 533.

[48] The fact that it is since the birth of the new approach, in the late 1980s, that concerns over spreading Community competence have come to the fore—culminating in the proposed constitution—indicates that the new approach has above all functioned as a mechanism to enable the Community to legislate more broadly, and thus occupy more territory that was previously that of the Member States, at the relatively minor cost of sacrificing some legislative detail.

[49] See JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2476–8.

[50] See Chalmers, above n 23, 140–44.

## VII. THE EUROPEAN EXPERIENCE

Subsidiarity has been widely used as a political and rhetorical device: it is used as a procedural guide at the pre-legislative stage,[51] and can be invoked before the Court of Justice. In every case where it has been before the Court, the Member States have lost because they have, as in the sausages and education examples, invoked other interests that are legally irrelevant.[52] The Community was generally seeking to harmonise in order to create the uniformity that allows easy movement and fair competition, and the state claims that they were capable of regulating the particular sector in question were irrelevant. Perhaps they were, but they were not capable of ensuring that all states regulated in the same way. This uniformity of regulation was, however, the Community's goal, and so the goal relevant to subsidiarity. In each case this inability of the states to ensure uniformity between states was precisely the argument of the Court in rebutting the Member State arguments.

Politically the story is similar. No body has pushed subsidiarity as hard as the German Länder, which were familiar with the concept from German law and wished to see it acquire teeth in the Community context.[53] It seemed to them that Community law enabled the German domestic division of powers to be bypassed. While certain matters were reserved, under German law, for the regions, nevertheless the Federal Government acting in Brussels seemed to have the capacity to pass measures that touched on these regional competences, for example education. Yet as with the lawsuits, the kinds of measures that offended the Länder were the internal market ones, the ones whose aim was harmonisation for the sake of uniformity, the goal that only the centre can achieve and to which subsidiarity provides no answer.[54]

It seems as if subsidiarity confuses. Each level looks at a measure in terms of its own objectives. Thus Member States and their constituent parts look at measures concerning sausages and education and ask whether they can regulate these things sufficiently. Of course they can! They have more expertise in sausages and education than the Community does, and much more knowledge of the particular factors relevant

[51] Protocol to the Treaty of Amsterdam on the Application of the Principles of Subsidiarity and Proportionality, above n 1; Impact Assessment Guidelines, 15 June 2005, SEC(2005)791; Communication from the Commission on Impact Assessment, 5 June 2002, COM(2002)276 Final (expanding on the principles behind the guidelines).

[52] See cases: *Alliance for Natural Health*; *British American Tobacco*; *Working Time Directive*; *Biotechnology Directive*, above n 12.

[53] C Jeffery, 'Regions and the Constitution for Europe: German and British Impacts' (2004) 13 *German Politics* 605; FC Mayer, 'Competences—Reloaded? The Vertical Division of Powers in the EU and the New European Constitution' (2005) 3 *International Journal of Constitutional Law* 493.

[54] Mayer, above n 53.

to their own state. From this point of view it looks as if subsidiarity is on their side. However, as a matter of law they are wrong in thinking that protecting national preferences and culture, or the quality of sausages and degrees, is the 'objective' of the Community measure which must be sufficiently achieved. Subsidiarity is only concerned with the objectives that the higher level is pursuing. In order to understand subsidiarity Member States have to look from the Community's perspective, and set aside their autonomous national interests.

Clearly—given their failure to do so in lawsuits—this is asking quite a lot from the Member States, and it is also silencing the most important arguments that they have.[55] Of course in principle there is nothing to stop them from bringing an additional proportionality argument to the effect that the Community progress in free movement does not justify the high national costs.[56] However, the pervasiveness of subsidiarity as the framework for competence issues seems to blind them to this possibility.

One may expect something similar to be happening at the pre-legislative stage. The Commission has lots of subsidiarity checklists which it goes through when developing measures, and no doubt if the measure passes all the tests, then it is put forward with a clear conscience and a light heart.[57] Yet this should not be the case. The really important competence issues will be still unconsidered, and again the dominance of the principle may be elbowing more important arguments out of the way. A linguistic comment may be appropriate: the structure of subsidiarity and its focus on the object of the measure encourage a blinkered approach to thinking about these issues.

On the whole, subsidiarity may at the moment be doing more harm than good. At some points, and in some contexts, there may be important arguments to be had about who can best achieve given goals. However, the issue that continues to confront the Community is one of substantive conflict of goals between levels, and emphasising subsidiarity is not making it easier to address this openly and sensibly. As a result, important national goals do not carry the weight in decision-making that they deserve, while hostility to the Community is cultivated at national level as a result of apparent disrespect for national priorities.[58]

An example of subsidiarity not helping may be found in the procedure embodied in a protocol to the proposed EU constitution,[59] for subsidiarity

[55] Schilling, above n 35.

[56] Above n 22.

[57] Impact Assessment Guidelines; Communication from the Commission on Impact Assessment, above n 52.

[58] See Von Bogdandy and Bast, above n 2; G De Burca and B De Witte, 'The Delimitation of Powers Between the EU and its Member States' in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002) 213.

[59] Treaty Establishing a Constitution for Europe OJC 2004/310/01. At time of writing the

consultation with national parliaments.[60] Each proposal for legislation would be sent out to them and they would have the chance to submit opinions on its compatibility with the principle. If more than a certain number did so, the Commission would be obliged to respond with a reasoned opinion, and if the parliaments were still not satisfied there would still be the possibility of legal action on the question.[61]

This involvement of national parliaments has a certain logic to it; if the competences of the lower level are to be protected, then it makes more sense to ask them if the higher-level measure is justified than it would be to ask the higher level itself, eg, the European Parliament. Moreover, national parliaments remain the primary democratic organs in Europe, so the democratic legitimacy of measures would be given a boost by their assent. For these reasons—who dares be against democracy and subsidiarity?—the protocols instituting this procedure formed one of the few aspects of the constitution that had widespread support, and the procedure is not yet dead; the constitution may yet come in, in whole or in part, and if in part, then this is one of the parts that may well survive.

Yet how much sense does it make to ask national parliaments whether they are capable of achieving the goals that the Community is trying to reach? Firstly, parliaments are bad on technical questions—it would make more sense for the Commission to consult with national administrative agencies—and secondly, is there any chance at all that parliaments will actually answer this question?[62] It is in the nature of politicians that the question which will capture them is whether or not the measure is one that the Community ought to take, a far more open and political question than subsidiarity contains. They will object, saying that sausages and universities should be for the Member States to regulate, and face a technical rebuff because their arguments are legally beside the point. The dynamic of the lawsuits will be re-enacted at a political level.

The only way this process can make sense is if all parties accept subsidiarity as no more than a cipher for the desirability of Community action, a question to be decided by elected representatives.[63] But if that is the case, and the internal structure and logic of subsidiarity is stripped

constitution has been abandoned under that name following embarrassing negative referenda in France and the Netherlands, but most of its content, including the protocol referred to, is being reformulated as an amending treaty which the Member States hope to sign late in 2007.

[60] Protocol to the Treaty establishing a Constitution for Europe, on the role of national parliaments in the European Union; Protocol to the Treaty establishing a Constitution for Europe, on the application of the principles of subsidiarity and proportionality.

[61] See G Davies, 'The Post-Laeken Division of Competences' (2003) 28 *European Law Review* 686.

[62] *Ibid*.

[63] See Emiliou, above n 46; Toth, above n 17; Bermann, above n 15, 393–4.

out, then appeal to the Court of Justice will be a damp squib; no court will second guess the purely political desirability of a measure. Thus the process will be one without teeth.[64]

The writers of the constitution reflect the same confusion about what subsidiarity is that we see in the lawsuits and the political rhetoric. Yet it does have a meaning, and one that the Court and Commission use. Better to accept this, and with it to accept that subsidiarity cannot do everything that everyone wants it to do.

## VIII. CONTEXT IS EVERYTHING

The difference is perhaps between autonomy of organisation and of policy. Subsidiarity protects, to some extent, the right of states to carry out missions in their own way. It does not protect their right to formulate their own mission or make substantive choices about values and policy.

Subsidiarity would therefore be useful within a corporation, or an organisation where strategy is formulated at the top, and where the lower levels are expected to be serving the same goals as the higher, and to have no independent goals outside the scope of the higher purpose. Then it would ensure that implementation took place at the most efficient level.

International organisations are not like this. Policy trickles up at least as much as it trickles down, and there is substantive and important and independent policy-making at each level, with conflicts inevitably arising. The challenge is how to deal with this. Until recently scholars of the EU were enthusiastic about models of participation and multi-level governance, in which the impossibility of clear division of competences was addressed via communication between levels and representation of all interests in all decision making places. While the perception that there can never be a clear line between Community and national activities seems quite right, it is increasingly clear that participatory responses are not enough. Even if everyone is heard, there will not always be a consensus; there is no single policy which satisfies all.

This means that conflict management is needed, which in turn entails an open acceptance by Courts and Community organs of the fact that not everyone can achieve all their goals. Member States have long accepted this, and are used to redesigning their national policies to comply with Community law. However, the Community, encouraged by far-reaching judgments on the nature of Community law from the Court of Justice, tends to adhere to a fundamentalist approach. Its goals cannot be compromised—there is no space for that in the Treaty. Therefore it is hardly

[64] See Toth, *ibid*; Snell, above n 8.

surprising that the Community can embrace subsidiarity without too much trouble. While it may occasionally result in the reallocation of an activity from the Community to Member States, its greater importance lies in the fact that it assumes the inevitability of fully achieving Community goals, and denies a discursive place to any of the good reasons not to do this.

## IX. CONCLUSIONS

Legislative measures typically have a whole bunch of effects, and the objectives of those who support them will differ too. Any attempt to look at them in the light of just one purpose, or the purposes of just one involved party, is stifling of discussion and will hinder intelligent discussion about their value and importance. There really should be no role for a principle which pretends that what the Community wants is the only goal that matters.

More aesthetically, one should be suspicious of a principle that refers to the objectives of a measure. Measures do not have objectives; people do. Embedding the psychological in the inanimate is a factually implausible rhetorical trick that serves to privilege certain goals and elevate them beyond discussion or compromise. Suppose subsidiarity were rephrased this way, which I do not think changes the meaning:

> Wherever the Community wishes to achieve something it will make the maximum possible use of national authorities and bodies to do this.

Would it have such a good press?